A

Pentadbir Tanah Johor Bahru v Tanah Sutera Development Sdn Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01(A)-324–06 OF 2021
LEE SWEE SENG, AHMAD ZAIDI IBRAHIM JJCA AND AZMAN ABDULLAH J
31 MAY 2023

C

Civil Procedure — Appeal — Procedure — Application to extend time to serve record of appeal — Application to strike out notice of cross-appeal — Application to strike out notice of appeal — Whether notice of appeal bad in law for not disclosing questions of law — Whether notice of appeal bad in law and
D *incompetent by virtue of s 40D(3) and proviso to s 49(1) of Land Acquisition Act 1960 ('LAA') — Whether questions stated in memorandum of appeal were questions of law — Whether one day late service of record of appeal was curable — Whether memorandum of appeal failed to comply with r 18(1) of the Rules of the Court of Appeal 1994 ('RCA') — Whether decision of High Court complied*
E *with s 40C of LAA — Whether non-inclusion of 'Judge's notes' pursuant to r 18(4)(b) of RCA was fatal such that appeal ought to be struck out — Whether objection on ground that 'separate volumes' of appeal record were not filed valid in circumstances of case — Whether respondent's notice of cross-appeal should be struck out – Land Acquisition Act 1960 ss 40D(3) and 49(1) — Rules of the*
F *Court of Appeal 1994 rr 5(3), 18(1) & (4)(b), 102 & 103*

In the present case, the High Court sitting as a Land Reference Court had increased the amount of compensation with respect to part of the respondent's land that had been compulsorily acquired by the government. Aggrieved by the
G decision, the land administrator ('the appellant') had filed a notice of appeal whereas the respondent had filed a notice of cross-appeal. The appellant in its motion ('encl 18') had prayed, firstly, to extend the time to serve the record of appeal by one day for it was one day late in serving on the respondent ('one-day late service'), though filed within time, and secondly, to strike out the notice of
H cross-appeal filed by the respondent. In response, the respondent filed encl 54 to strike out the notice of appeal filed by the appellant principally on ground that such notice did not disclose the questions of law for the appeal. The issues arose in the present appeal were: (a) whether the appellant's notice of appeal was bad in law and incompetent such that it should be struck out for not
I disclosing the questions of law appealed on; (b) whether the notice of appeal was bad in law and incompetent by virtue of s 40D(3) and the proviso to s 49(1) of the Land Acquisition Act 1960 ('the LAA'); (c) whether the questions as stated in the memorandum of appeal were questions of law for the purpose of the appeal; (d) whether the 'one-day late service' objection of the record of

appeal was curable; (e) whether the memorandum of appeal had failed to comply with r 18(1) of the Rules of the Court of Appeal 1994 ('the RCA'); (f) whether the decision of the High Court had complied with s 40C of the LAA; (g) whether the non-inclusion of the 'Judge's notes' pursuant to r 18(4)(b) of the RCA was fatal such that the appeal ought to be struck out; (h) whether the objection on the ground that 'separate volumes' of appeal record (Part A, B and C) were not filed was valid in the circumstances of the case; and (i) whether the respondent's notice of cross-appeal should be struck out.

Held, allowing the appellant's application to enlarge time to file the record of appeal with no order as to costs, dismissing the appellant's application to strike out the cross-appeal, and dismissing encl 54 with costs in the cause:

(1) It was common ground as confirmed by case law that any appeal from the decision of the High Court sitting as a Land Reference Court had to be on questions of law. Pursuant to r 5(3) of the RCA, 'A notice of appeal shall substantially be in Form 1 in the First Schedule'. All that Form 1 required was that an appellant to state whether he was appealing against the whole or only a part of the High Court's decision. In the present case, the appellant was appealing against the whole of the decision. That was precisely what was said in its notice of appeal. The requirement of setting out 'the grounds relied upon' by the respondent in a notice of cross-appeal was not found in a notice of appeal. There was thus no need to read into Form 1 the requirements that were not there. Grounds of appeal and with that the questions of law appealed on were best framed and formulated after the full grounds of judgment were furnished to the parties. Therefore, both on point of procedure and for practical purposes, it was sufficient if the questions of law were stated in the memorandum of appeal (see paras 11–13, 15, 22 & 30).

(2) The bar to appeal was not absolute for s 49 of the LAA allowed all appeals 'except' for those where the High Court's decision comprised an award of compensation. In other words, it was not a ground of appeal that the award was excessively high or inadequately low. If in answering the question of law raised, the award of compensation was increased or reduced, that was merely its unintended consequence, and the appeal was not incompetent as such. Any objection to the appeal being incompetent as in that there was no question of law raised that could be discerned from the memorandum of appeal, should more properly be raised at the substantive hearing of the appeal especially when the respondent raising it had a cross-appeal. The court therefore agreed with the appellant that a question of law under s 49(1) of the LAA was an issue that demanded time for considered deliberation and it would thus be wise, on the facts of this case, to unpack this objection at the substantive hearing of the appeal (see paras 37, 40–41 & 46).

(3) Based on the Federal Court's decision in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya'), the first ground in the memorandum of appeal being the appellant's complaint against the High Court judge acting in excess of her jurisdiction or power was unencumbered by the proviso to s 49(1) of the LAA. In respect of the second ground in the memorandum of appeal, the Federal Court in *Semenyih Jaya* categorically held that the non-observance by the High Court judge of the protocols of s 40C of the LAA tainted the judge's decision and that such an award ought to be set aside as s 40C of the LAA was a mandatory provision; it was a peremptory order that must not be breached. The court could not see any good reason why the above questions were not questions of law which were properly allowed in an appeal to the Court of Appeal on questions of law (see paras 48–50).

(4) While all rules of the court were to be complied with, the law was not so inflexible as to bar completely an appeal merely because the service of the record of appeal was a day late. The court always had a discretion to extend or enlarge time for a minor non-compliance provided no serious prejudice had been caused. Here the notice of appeal and record of appeal were both filed on time. The delay of one day in service of the record of appeal could not be prejudicial to the respondent at all. The respondent was already conscious of the fact that there was an appeal filed (see paras 52–53).

(5) The court found merits in the appellant's argument that all three elements required by r 18(1) of the RCA namely, (a) the head of objection, (b) the ground of objection, and (c) the point of law wrongly decided by the High Court judge, were all reflected in each ground of appeal in the memorandum of appeal. It was contradictory for the respondent to say that the grounds of appeal were too vague and general as it had no problem filing its notice of cross-appeal. A cross-appeal was after all, an appeal on precisely the same point that the appellant was appealing on except that an opposite result was argued by the respondent instead. Further, the respondent had never claimed in its affidavits that it was unable to comprehend the grounds of appeal in the memorandum of appeal. More importantly the respondent had not alleged, let alone shown, that it had suffered a substantial miscarriage of justice, as required under r 3A of the RCA (see paras 67, 69 & 71).

(6) The court agreed that the question as to what was sufficient compliance with s 40C of the LAA and the effect of non-compliance, was a question of law that should properly be heard at the substantive appeal. The respondent's striking out application was thus without merit and misconceived (see para 80).

(7) The court agreed with the appellant that: (a) under the 'Arahan Amalan Mahkamah Rayuan 01/2017' ('AAMR 01/2017'), 'the Judge's notes of hearing' were not required; and (b) 'the Judge's notes of the hearing' were inapplicable in the instant case as they were only applicable to appeals after a full trial with viva voce evidence which was not the case here: see 'Arahan Amalan Mahkamah Rayuan 02/2011'. Even assuming that 'the Judge's notes of hearing' were required, it was still not fatal to the appellant's appeal as the reasons set about in 'the Judge's notes of the hearing' would have already been incorporated into the judge's grounds of judgment ('the GOJ') unless it could be shown that the reasons given as reflected in 'the Judge's notes of hearing' were different from the GOJ. In this regard, as no prejudice or substantial injustice had been shown, the defect was thus curable under r 102 of the RCA (see paras 86–88 & 91).

(8) Based on para 7.3(b), (c) and (e) of the AAMR 01/2017, there was no rigid or inflexible precept that required Part A to be separated from Parts B and C. In the present case, what the appellant had done was to merely merge Part A and Part B and (a few documents from) Part C in the volume because Part A had only 15 pages, Part B had none and Part C had 186 pages. The court could not see how the appellant's method of compilation was fatal to its appeal. In fact, the respondent had not objected to this compilation upon being served with the appeal record. Further, pursuant to r 103 of the RCA, the respondent's action in taking fresh steps after knowing of the irregularity was fatal to the respondent's application to strike out notice of appeal. The court found that this objection was frivolous and without merits, hence, the court dismissed this objection (see paras 104–108).

(9) The considerations for enlargement of time would be whether the delay of one day in service of the record of appeal would cause any substantial injustice to the respondent whereas that of striking out the notice of cross-appeal would be whether it was connected to the findings and decisions appealed against by the appellant and not a case where it sought to reverse or set aside the said findings or decisions. Therefore, for this prayer in encl 18 to strike out the cross-appeal, the court found that it should have been made by way of a separate motion and in any event the appellant had agreed to withdraw that prayer and so the court had dismissed that prayer with no order as to costs (see paras 112 & 131).

[Bahasa Malaysia summary

Dalam kes ini, Mahkamah Tinggi yang bersidang sebagai Mahkamah Rujukan Tanah telah meningkatkan jumlah pampasan berkenaan dengan sebahagian daripada tanah responden yang telah diambil secara paksa oleh kerajaan. Terkilan dengan keputusan tersebut, pentadbir tanah ('perayu') telah memfailkan notis rayuan manakala responden telah memfailkan notis rayuan

balas. Perayu dalam usulnya ('lampiran 18') telah memohon, pertama sekali, untuk memanjangkan masa untuk menyerahkan rekod rayuan selama sehari kerana ianya telah diserahkan lewat sehari kepada responden ('serahan lewat sehari'), walaupun ianya difailkan dalam masa yang ditetapkan, dan kedua, untuk membatalkan notis rayuan balas yang difailkan oleh responden. Bertindak balas terhadap tindakan tersebut, responden memfailkan lampiran 54 untuk membatalkan notis rayuan yang difailkan oleh perayu terutamanya atas alasan bahawa notis tersebut tidak mendedahkan persoalan-persoalan undang-undang untuk rayuan tersebut. Isu-isu yang timbul dalam rayuan ini adalah: (a) sama ada notis rayuan perayu adalah tidak sah di sisi undang-undang dan tidak kompetan sehingga ia harus dibatalkan kerana tidak mendedahkan persoalan undang-undang yang dirayu; (b) sama ada notis rayuan tersebut tidak sah di sisi undang-undang dan tidak kompeten menurut s 40D(3) dan proviso kepada s 49(1) Akta Pengambilan Tanah 1960 ('APT'); (c) sama ada persoalan-persoalan seperti yang dinyatakan dalam memorandum rayuan adalah persoalan-persoalan undang-undang untuk tujuan rayuan; (d) sama ada bantahan berkenaan 'serahan lewat sehari' rekod rayuan boleh diperbetulkan; (e) sama ada memorandum rayuan telah gagal untuk mematuhi k 18(1) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KKMR'); (f) sama ada keputusan Mahkamah Tinggi telah mematuhi s 40C APT; (g) sama ada kegagalan memasukkan 'nota Hakim' menurut k 18(4)(b) KKMR adalah memudaratkan sehingga rayuan tersebut perlu dibatalkan; (h) sama ada bantahan atas alasan bahawa 'jilid berasingan' rekod rayuan (Bahagian A, B dan C) tidak difailkan adalah sah dalam hal keadaan kes; dan (i) sama ada notis rayuan balas responden perlu dibatalkan.

Diputuskan, membenarkan permohonan perayu untuk memanjangkan masa bagi memfailkan rekod rayuan tanpa perintah berkenaan kos, menolak permohonan perayu untuk membatalkan rayuan-balas, dan menolak lampiran 54 dengan kos dalam kausa:

(1) Adalah menjadi asas bersama seperti yang disahkan oleh autoriti kes bahawa apa-apa rayuan daripada keputusan Mahkamah Tinggi yang bersidang sebagai Mahkamah Rujukan Tanah mestilah atas persoalan undang-undang. Menurut k 5(3) KKMR, 'A notice of appeal shall substantially be in Form 1 in the First Schedule'. Apa yang diperlukan oleh Borang 1 ialah perayu menyatakan sama ada dia merayu terhadap keseluruhan atau hanya sebahagian daripada keputusan Mahkamah Tinggi. Dalam kes ini, perayu merayu terhadap keseluruhan keputusan tersebut. Itulah yang dinyatakan dalam notis rayuannya. Keperluan untuk menyatakan 'the grounds relied upon' oleh responden dalam notis rayuan balas tidak terdapat dalam notis rayuan. Oleh itu, tiada keperluan untuk membaca ke dalam Borang 1 keperluan yang tidak ada. Alasan-alasan rayuan dan dengan itu persoalan-persoalan undang-undang yang dirayu sebaik-baiknya dirangka dan dirumuskan

selepas alasan penuh penghakiman diberikan kepada pihak-pihak. Oleh itu, dari segi prosedur dan untuk tujuan praktikal, adalah memadai jika persoalan undang-undang dinyatakan dalam memorandum rayuan (lihat perenggan 11–13, 15, 22 & 30). A

(2) Larangan untuk merayu adalah tidak mutlak kerana s 49 APT membenarkan semua rayuan 'kecuali' rayuan terhadap keputusan Mahkamah Tinggi yang merangkumi pemberian pampasan. Dalam erti kata lain, tidak menjadi alasan rayuan jika award yang diberikan adalah terlalu tinggi atau terlalu rendah. Jika dalam menjawab persoalan undang-undang yang dibangkitkan, pemberian pampasan dinaikkan atau dikurangkan, itu hanyalah akibat yang tidak diingini, dan rayuan tersebut tidaklah menjadi tidak kompeten disebabkan oleh keadaan tersebut. Apa-apa bantahan terhadap rayuan tersebut sebagai tidak kompeten kerana tiada persoalan undang-undang yang dibangkitkan yang boleh dilihat daripada memorandum rayuan, harus lebih wajar dibangkitkan pada pendengaran substantif rayuan terutamanya apabila responden yang membangkitkannya mempunyai rayuan balas. Oleh itu mahkamah bersetuju dengan perayu bahawa persoalan undang-undang di bawah s 49(1) APT adalah isu yang memerlukan masa untuk pertimbangan sewajarnya dan dengan itu adalah wajar, berdasarkan fakta kes ini, untuk membincangkan bantahan ini di dalam pendengaran substantif rayuan (lihat perenggan 37, 40–41 & 46). B C D E

(3) Berdasarkan keputusan Mahkamah Persekutuan dalam *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya'), alasan pertama dalam memorandum rayuan yang merupakan aduan perayu terhadap hakim Mahkamah Tinggi yang bertindak melebihi bidang kuasa atau kuasanya tidak dibebani oleh proviso kepada s 49(1) APT. Berkenaan dengan alasan kedua dalam memorandum rayuan, Mahkamah Persekutuan di dalam kes *Semenyih Jaya* dengan tegas memutuskan bahawa ketidakpatuhan hakim Mahkamah Tinggi terhadap protokol dalam s 40C APT mencemarkan keputusan hakim dan bahawa award tersebut sepatutnya diketepikan kerana s 40C APT adalah peruntukan mandatori; ia adalah perintah 'peremptory' yang tidak boleh dilanggar. Mahkamah tidak dapat melihat apa-apa sebab yang kukuh mengapa persoalan-persoalan di atas bukanlah persoalan undang-undang yang dibenarkan dengan sewajarnya dalam rayuan kepada Mahkamah Rayuan mengenai persoalan-persoalan undang-undang (lihat perenggan 48-50). F G H

(4) Walaupun semua peraturan mahkamah perlu dipatuhi, undang-undang tidak begitu tidak fleksibel untuk menghalang rayuan sepenuhnya hanya kerana penyerahan rekod rayuan yang lewat sehari. Mahkamah sentiasa mempunyai budi bicara untuk melanjutkan atau memperbesar masa bagi ketidakpatuhan kecil dengan syarat tiada prejudis yang serius telah I

ditimbulkan. Di sini notis rayuan dan rekod rayuan kedua-duanya difailkan tepat pada masanya. Kelewatan satu hari dalam penyerahan rekod rayuan tidak boleh memudaratkan responden sama sekali. Responden telah pun menyedari hakikat bahawa terdapat rayuan yang difailkan (lihat perenggan 52–53).

(5) Mahkamah mendapati bahawa terdapat merit dalam hujahan perayu bahawa ketiga-tiga elemen yang dikehendaki oleh k 18(1) KKMR iaitu, (a) tajuk bantahan, (b) alasan bantahan, dan (c) persoalan undang-undang yang diputuskan secara salah oleh hakim Mahkamah Tinggi, semuanya terdapat dalam setiap alasan rayuan dalam memorandum rayuan. Adalah menjadi suatu percanggahan bagi responden untuk mengatakan bahawa alasan-alasan rayuan adalah terlalu kabur dan umum apabila responden tidak mempunyai masalah untuk memfailkan notis rayuan balasnya. Rayuan balas ialah rayuan pada perkara yang sama yang dirayu oleh perayu kecuali keputusan yang bertentangan telah dihujahkan oleh responden. Selanjutnya, responden tidak pernah mendakwa dalam afidavitnya bahawa ia tidak dapat memahami alasan-alasan rayuan dalam memorandum rayuan. Lebih penting lagi, responden tidak mendakwa, apatah lagi menunjukkan, bahawa ia telah mengalami kegagalan keadilan yang ketara, seperti yang dikehendaki di bawah k 3A KKMR (lihat perenggan 67, 69 & 71).

(6) Mahkamah bersetuju bahawa persoalan tentang pematuhan yang mencukupi dengan s 40C APT dan kesan ketidakpatuhannya, adalah persoalan undang-undang yang sepatutnya didengar dengan sewajarnya dalam rayuan substantif. Oleh itu, permohonan pembatalan oleh responden tidak mempunyai merit dan merupakan salah anggap (lihat perenggan 80).

(7) Mahkamah bersetuju dengan perayu bahawa: (a) di bawah 'Arahan Amalan Mahkamah Rayuan 01/2017' ('AAMR 01/2017'), 'nota perbicaraan Hakim' tidak diperlukan; dan (b) 'nota perbicaraan Hakim' tidak terpakai dalam kes ini kerana ia hanya terpakai untuk rayuan selepas perbicaraan penuh dengan keterangan viva voce yang tidak berlaku di sini: lihat 'Arahan Amalan Mahkamah Rayuan 02/2011'. Walaupun dengan mengandaikan bahawa 'nota perbicaraan Hakim' diperlukan, ia masih tidak membawa mudarat kepada rayuan perayu kerana alasan-alasan yang dinyatakan dalam 'nota perbicaraan Hakim' telah pun dimasukkan ke dalam alasan penghakiman hakim melainkan dapat ditunjukkan bahawa alasan yang diberikan seperti yang ditunjukkan dalam 'nota perbicaraan Hakim' adalah berbeza daripada alasan penghakiman. Dalam hal ini, memandangkan tiada prejudis atau ketidakadilan yang ketara telah ditunjukkan, kecacatan tersebut boleh diperbetulkan di bawah k 102 KKMR (lihat perenggan 86–88 & 91).

(8) Berdasarkan perenggan 7.3(b), (c) dan (e) AAMR 01/2017, tiada

peraturan tegar atau tidak fleksibel yang memerlukan Bahagian A diasingkan daripada Bahagian B dan C. Dalam kes ini, apa yang telah dilakukan oleh perayu adalah dengan hanya menggabungkan Bahagian A dan Bahagian B dan (beberapa dokumen daripada) Bahagian C dalam jilid tersebut kerana Bahagian A hanya mempunyai 15 muka surat, Bahagian B tiada muka surat dan Bahagian C mempunyai 186 muka surat. Mahkamah tidak dapat melihat bagaimana kaedah kompilasi perayu membawa mudarat kepada rayuannya. Malah, responden tidak membantah kompilasi ini apabila diserahkan dengan rekod rayuan. Selanjutnya, menurut k 103 KKMR, tindakan responden mengambil langkah baharu selepas mengetahui tentang ketidakaturan tersebut telah memudaratkan permohonan responden untuk membatalkan notis rayuan. Mahkamah mendapati bahawa bantahan ini adalah remeh dan tanpa merit, justeru, mahkamah menolak bantahan ini (lihat perenggan 104–108).

(9) Pertimbangan untuk pemanjangan masa adalah sama ada kelewatan satu hari dalam menyerahkan rekod rayuan akan menyebabkan apa-apa ketidakadilan yang besar kepada responden manakala pertimbangan untuk membatalkan notis rayuan balas adalah sama ada ia berkaitan dengan dapatan-dapatan dan keputusan-keputusan yang dirayu oleh perayu dan bukanlah kes di mana ia cuba untuk membalikkan atau mengenepikan dapatan-dapatan atau keputusan-keputusan tersebut. Oleh itu, bagi permohonan dalam lampiran 18 ini untuk membatalkan rayuan balas, mahkamah mendapati bahawa ia sepatutnya dibuat melalui usul berasingan dan dalam apa jua keadaan perayu telah bersetuju untuk menarik balik permohonan tersebut dan oleh itu mahkamah telah menolak permohonan tersebut tanpa perintah berkenaan dengan kos (lihat perenggan 112 & 131).]

Cases referred to

A Santamil Selvi a/p Alau Malay @ Anna Malay & Ors v Dato' Seri Mohd Najib bin Tun Abdul Razak & Ors [2015] 4 MLJ 583, CA (refd)

Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat [2021] 4 MLJ 1; [2021] 2 MLRA 19, FC (refd)

Douglas Ding Jangan & Ors v Kerajaan Negeri Sarawak & Ors [2021] 4 MLJ 946, FC (refd)

Jacy ak Tintang & Anor v Mayan ak Nayang [2022] 6 MLJ 153, CA (refd)

Joseph Lee Yok Min @ Ambrose v Mayban Securities Sdn Bhd, Ipoh Branch (formerly known as Philleoallied Securities Sdn Bhd) & Anor [2014] 2 MLJ 848; [2018] 6 MLRA 458, CA (refd)

Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors [2016] 5 MLJ 557, FC (refd)

Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim and another appeal [2022] 4

MLJ 194; [2022] 5 MLRA 25, FC (refd)
Lee Guat Eng v Tan Lian Kim [1985] 2 MLJ 196, SC (refd)
Low Cheng Soon v TA Securities Sdn Bhd [2003] 1 MLJ 389; [2002] 2 MLRA 298, CA (refd)
Malayan Banking Bhd v Syed Ali Mohsin [1991] 2 MLRH 25; [1991] 3 CLJ Rep 236, HC (refd)
Megat Najmuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd [2002] 1 MLJ 385, FC (refd)
Mohamad Safuan Wasidin & Anor v Mohd Ridhuan Ahmad (an infant) [1994] 2 MLJ 187; [1994] 4 MLRH 432, HC (refd)
Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd [1997] 1 MLJ 557, CA (refd)
National Union of Bank Employees v Director General of Trade Unions & Anor [2013] 6 MLJ 167, FC (refd)
Neoh Choo Ee & Co Sdn Bhd v Vasalamany Govindasamy & Anor [2002] 2 MLRA 486, CA (refd)
Palata Investments Ltd and others v Burt & Sinfield Ltd and others [1985] 2 All ER 517, CA (refd)
Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor [2016] 3 MLJ 365, CA (refd)
Pentadbir Tanah Daerah Johor v Nusantara Daya Sdn Bhd [2021] 4 MLJ 570; [2021] 4 MLRA 466, FC (refd)
Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 2 MLJ 424, HC (folld)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526; [2017] 4 MLRA 554, FC (folld)
Shahrum Kazindin v Pentadbir Tanah Daerah Petaling, Selangor [2019] MLJU 1376, HC (refd)
Siaw Swee Mie v Lembaga Lebuhraya Malaysia [2019] 4 MLJ 406, CA (refd)
Syed Hussain bin Syed Junid & Ors v Pentadbir Tanah Negeri Perlis and another appeal [2013] 6 MLJ 626; [2013] 6 MLRA 551, FC (refd)
Tan Kim Beng & Ors v Datuk Yen Ying Pang @ Kenneth Yen Yin Pin & Ors [2013] 4 MLJ 437, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 28, 28(1), 68(1)(d)
Land Acquisition Act 1960 ss 3, 40C, 40D(3), 49, 49(1), Form N
Rules of the Court of Appeal 1994 rr 1A(1), 3A, 5, 8, 18(1), (4)(b), (7), (9), 93, 102, 103, 104, First Schedule, Forms 1, 2

Appeal from: *Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru* [2021] MLJU 1324 (High Court, Johor)

Adi Radlan bin Abdul Rahman (Adi Radlan & Co); Muhammad Azzam bin Zainal Abidin (Legal Advisory for State of Johor) for the appellant.

Ibrahim bin Hashim (with Haffirrudin bin Osman) (Haffirrudin Osman & Co) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] Both parties have filed applications to derail the other in their appeals before the Court of Appeal. the appellant in its motion in encl 18 had prayed to extend the time to serve the record of appeal by one day for it was one day late in serving on the respondent, though filed within time. the other prayer in the same motion is to strike out the notice of cross-appeal filed by the respondent.

[2] The respondent on the other hand had filed an application in encl 54 to strike out the notice of appeal filed by the appellant principally on ground that the notice of appeal does not disclose the questions of law for the appeal. there were other grounds for striking out the notice of appeal and these will be considered below.

AT THE HIGH COURT

[3] The High Court sitting as a land reference court had increased the amount of compensation with respect to part of the respondent's land that had been compulsorily acquired by the government.

[4] The High Court had granted compensation under the heads of severance and injurious affection which was not granted by the land administrator. Diagram 1 below shows the award of the High Court as opposed to that of the land administrator and the increase in compensation as follows:

Diagram 1			
Extract from brief grounds of decision			
	Compensation amount	Award of land administrator	Additional compensation
Value of 13 terrace plots of 1439.11 meter2	RM2,734,309	RM3,056,010	(RM321,701)
Nominal Value for Road Reserve of 2,989.89 meter2	RM10		RM10
Severance	RM3,927,395		RM3,927,395
Injurious Affection	RM1,145,472		RM1,145,472
Incidental Cost	RM117,210		RM117,210

Diagram 1			
Extract from brief grounds of decision			
	Compensation amount	Award of land administrator	Additional compensation
Loss of rental	RM20,000		RM20,000
TOTAL	RM7,944,396	RM3,056,010	RM4,888,386

[5] Aggrieved by the said decision, the land administrator had filed a notice of appeal to the Court of Appeal. the company, Tanah Sutera Development Sdn Bhd, whose land had been acquired did not file a notice of appeal but instead filed a notice of cross-appeal.

BEFORE THE COURT OF APPEAL

[6] The respondent before us had filed a motion to strike out the appeal, presumably under r 104 of the Rules of the Court of Appeal 1994 ('the RCA') and the relevant rr 102–104 are set out below as follows:

> PART IV
>
> Effect of Non-Compliance
>
> 102 Non-compliance with Rules not to render proceedings void.
>
> Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit.
>
> 103 Application to set aside for irregularity when allowed.
>
> No application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.
>
> 104 Objections of irregularity.
>
> When an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion.

[7] the grounds for striking out the notice of appeal are spelt out as follows:

(a) that the notice of appeal was defective as it did not set out the questions of law for the Court of Appeal to answer;

(b) that the appeal is barred by s 40D(3) and s 49(1) *proviso* in Land Acquisition Act 1960 ('the LAA');

(c) that the appellant was one day late in serving its appeal record on the respondent's solicitors;

(d) that its memorandum of appeal is defective for non-compliance with r 18(1) of the RCA;

(e) that its appeal is academic since both the assessors at the High Court have already furnished their respective written opinions under s 40C;

(f) that its appeal is incompetent for failing to attach to the record of appeal a copy of the judge's notes, pursuant to r 18(4)(b) of the RCA 1994;

(g) that its appeal is incompetent because it did not comply with *Arahan Amalan* 02/1991 by applying for notes of proceedings; and

(h) that its appeal is incompetent because it did not compile Parts A, B and C of the appeal record into separate volumes.

[8] these grounds may be succinctly summarised as follows:

(a) the 'notice of appeal vis a vis Form 1' objection;

(b) the 's 40D(3) and s 49(1) proviso' objection;

(c) the 'one-day late service' objection;

(d) the 'memorandum of appeal vis a vis r 18(1)' objection;

(e) the 's 40C' objection;

(f) the 'judge's notes' objection;

(g) the 'Arahan Amalan 02/1991' objection; and

(h) the 'separate volumes' objection.

Whether the appellant's notice of appeal is bad in law and incompetent such that it should be struck out for not disclosing the questions of law appealed on

[9] The respondent had, by its amended motion in encl 54 dated 23 May 2022 (initially filed on 27 September 2021 as encl 14 motion), sought to strike out the appellant's notice of appeal principally on ground that the notice of appeal does not disclose the questions of law appealed from.

[10] The appeal in the instant case by the land administrator had been made presumably under s 49(1) of the LAA which s 49 reads as follows:

> 49 Appeal from decision as to compensation.
>
> (1) Any person interested, including the land administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court:
>
> *Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.*

A (2) Every appeal under this section shall be presented within the time and in the manner provided for appeals in suits in the High Court:

Provided that the time within an appeal may be presented shall only be capable of enlargement by order of a Court in such special circumstances as the Court may think fit.

B (3) (Omitted) (Emphasis added.)

[11] It is common ground as confirmed by case law that any appeal from the decision of the High Court sitting as a land reference court has to be on C questions of law.

[12] Rule 5 of the RCA reads:

5 Appeal to be by re-hearing on notice.

D (1) Appeals to the court shall be by way of re-hearing and shall be brought by giving notice of appeal.

(2) Security for costs shall be given as provided in rule 17.

(3) *A notice of appeal shall substantially be in Form 1 in the First Schedule.*

E (4) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only, and what part, of the judgment or order is complained of.' (Emphasis added.)

Form 1 of the First Schedule of the RCA is set out below:

NOTICE OF APPEAL

F

Take notice that ..... being dissatisfied with the decision(s) ..... on the ..... day of ..... 19... appeals to the Court of Appeal against

(the whole of the said decision(s) either/or (such part only of the said decision(s) (as decides that

G

(Set out details)

Dated this ..... day of ..... 19....

.....
Appellant
Solicitor for the Appellant

H (Emphasis added.)

[13] All that Form 1 requires is that an appellant states whether he is appealing against the whole or only a part of the High Court's decision. In our I case, the appellant ('Pentadbir Tanah Johor Bahru') is appealing against the whole of the decision. That is precisely what is said in its notice of appeal.

[14] This is to be contrasted with the notice of cross-appeal which is to be filed not more than ten days after the service of the record of appeal which

contains the memorandum of appeal of the appellant setting forth the grounds of appeal and the questions of law in a case of an appeal from the High Court in a land reference matter. See r 8 of the RCA. The notice of cross-appeal shall be substantially in Form 2 in the First Schedule of the RCA which reads as follows:

NOTICE OF CROSS-APPEAL

Take notice, that on the hearing of the above appeal, CD., the Respondent above-named, will contend that the decision's) of the Honourable Mr. Justice ..... given at..... on the..... day of..... 19..... ought to be varied to the extent and on the grounds hereinafter set out:
(Set out in numbered paragraphs —
(a) the nature of the relief claimed; and
(b) the grounds relied upon.)

Dated at .....the day of .....,19.....

.....
Respondent
Solicitor for the Respondent
(Emphasis added.)

[15] The requirement of setting out 'the grounds relied upon' by the respondent in a notice of cross-appeal is not found in a notice of appeal that which merely requires the appellant to state if it is appealing against 'the whole of the said decision(s) either/or (such part only of the said decision(s) (as decides that (set out the details)).

[16] One can surmise that the reason why a notice of cross-appeal is only required to be filed not more than ten days after the service of the record of appeal is that by that time the respondent would have read the memorandum of appeal and would apprise itself of the grounds of appeal and the questions of law set out in the memorandum of appeal. If the grounds of appeal are required to be set out in the notice of appeal, then there would have been no necessity to require a notice of cross-appeal, if the respondent is minded to file it, to do so only after the service of the record of appeal and not later than ten days after such a service.

[17] Learned counsel for the respondent submitted that the notice of appeal itself must state the questions of law that the appellant is appealing against in order, at the outset of the appeal process, to meet the threshold requirement under s 49(1) of the LAA which only allows an appeal on questions of law.

[18] The Court of Appeal has resolved this issue with finality in *A Santamil*

Selvi a/p Alau Malay @ Anna Malay & Ors v Dato' Seri Mohd Najib bin Tun Abdul Razak & Ors [2015] 4 MLJ 583 where it held that there is no need for the appellant to disclose in his notice of appeal the *issues or points or questions of law* that he wishes to appeal against. The Court of Appeal said at p 590 as follows:

> [14] In our view, where the appeal is against one decision involving a single respondent or involving more than one respondent in a joint action, it will be in order for the appellant to state in a single notice of appeal that he is appealing against 'the whole of the said decision' *without setting out the details of the decision appealed against.* (Emphasis added.)

[19] Likewise the Court of Appeal in *Neoh Choo Ee & Co Sdn Bhd v Vasalamany Govindasamy & Anor* [2002] 2 MLRA 486 dispelled the erroneous view that there is any requirement for the appellant to expressly state the question of law in the notice of appeal. That case was a decision of the Director General of Labour on the calculation of the rate of pay with respect to whether outturn allowance should be taken into account. The respondent being dissatisfied with the decision, appealed by giving a notice of appeal to the High Court. For the purposes of such an appeal, the Director General of Labour is treated as a subordinate court by virtue of s 3 of the Courts of Judicature Act 1964 ('the CJA') read together with s 28 of the CJA.

[20] Section 28(1) of the CJA reads as follows:

> 28(1) Subject to any other written law, *no appeal shall lie to the High Court* from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject-matter is ten thousand ringgit or less *except on a question of law.* (Emphasis added.)

[21] Gopal Sri Ram JCA (later FCJ) clarified and confirmed the position of the law that where an appeal is permitted only on questions of law, there is no necessity that the questions of law must be stated in the notice of appeal. It is enough if it is stated in the memorandum of appeal. His Lordship stated at pp 488–489 as follows:

> The section (s 28 of the CJA) does not say that the notice of appeal should expressly state the questions of law. Neither does O 49 of the Subordinate Court Rules 1980 nor O 55 of the Rules of High Court 1980. *We therefore find that there is nothing wrong with the notice of appeal lodged by the appellant with the High Court. It conforms with the statutory form provided by the rules of court.* It has not prejudiced the respondents in any way. Indeed, they made no complaint about it in the first place. It was the High Court which took the point *suo motu.* that shows there was no prejudice. If there had been, counsel for the respondents would surely have complained. We are therefore, with respect, unable to agree with the learned judge that a notice of appeal in Form 140 of Subordinate Court Rules 1980 should set out the question or questions of law which the appeal involves. We agree with Mr A Suppiah of counsel for appellant that *points of law will in the usual way be taken in*

the memorandum of appeal and it is to that document that the High Court ought to have resort. If upon reading the memorandum of appeal and the record of appeal as a whole the High Court comes to the conclusion that the appeal does not involve a question of law, then it would no doubt deal with the point in the ordinary way, when the appeal is called on for hearing.

But it must be said at once in fairness to the learned judge that he was persuaded to take the view he took by two decisions of the High Court. In *Malayan Banking Bhd v Syed Ali Mohsin* [1991] 2 MLRH 25; [1991] 3 CLJ Rep 236, Lamin Yunus J (as he then was) said:

I am of the view that in the case of an appellant intending to appeal on questions of law, the notice of appeal in Form 140, must state at least in general form the question or questions of law that he wishes to appeal on.

Again in *Mohamad Safuan Wasidin & Anor v Mohd Ridhuan Ahmad (an infant)* [1994] 2 MLJ 187; [1994] 4 MLRH 432, Abdul Malik Ishak J expressed the following view:

In my judgment, in the case of an appellant intending to appeal from the decision of the subordinate court where the quantum is less than RM10,000, the notice of appeal in Form 140 must state generally the question or questions of law that he wishes to appeal on. Any failure to conform to this basic statutory requirement would strike at the very core of the appeal and, consequently, would nullify the appeal.

Now it is plain that the views expressed in those two cases do not coincide with the opinion we have expressed a moment ago. In our opinion those cases were wrongly decided and should no longer be considered good law. For otherwise, the court would be imposing a condition of appeal that written law does not prescribe. (Emphasis added.)

[22] There is thus no need to read into Form 1 the requirements that are not there. Grounds of appeal and with that the questions of law appealed on are best framed and formulated after the full grounds of judgment are furnished to the parties. By and large, the full grounds may not be available on the date of the decision but only brief or broad grounds and upon an appeal being filed within 30 days from the date of decision, then the full grounds of judgment would be prepared and subsequently furnished by the High Court judge.

[23] We have difficulty appreciating the argument of the respondent that the notice of appeal is vague, uncertain and confusing as it did not convey with sufficient clarity whether the appeal is on law or otherwise and on which head of award of compensation and that had led to misapprehension as to what questions of law the respondent needed to answer to.

[24] However, the respondent had no difficulty in filing its notice of cross-appeal after the service on the respondent of the record of appeal containing the memorandum of appeal, setting out the questions of law that the appellant is appealing on.

[25] The Federal Court case of *Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim and another appeal* [2022] 4 MLJ 194; [2022] 5 MLRA 25 was cited in support of the respondent's proposition but the Federal Court was addressing the issue of whether filing a single notice of appeal against two decisions was ambiguous, defective and bad in law and should be struck out. The Federal Court found that the two decisions appealed against were clearly stated in the notice of appeal so as not to render it defective or bad in law. In that context the Federal Court observed as follows:

> [28] It is important to bear in mind that the primary objective of r 5(3) of the RCA 1994 is to enable the opposing party to be properly informed of the case they have to answer. If the opposing party is unable to fathom which decision or which part of a decision is being appealed against, it would lead to uncertainty and misapprehension on the part of the opposing party and as to what points they were required to answer to. Such a situation would undoubtedly cause prejudice and a miscarriage of justice to the opposing party.
>
> [31] In situations where, a preliminary objection is taken against a notice of appeal in the Court of Appeal or where a motion is filed to that effect, it is therefore incumbent upon the Court of Appeal to scrutinise the notice of appeal in question. It is for the Court of Appeal to consider whether the appeal relates to a single decision, or more than one decision, or is against part of the decision or decisions given; and if so, whether the decisions in question have been clearly and concisely identified. There should not be any ambiguity or doubt relating to the decision appealed against.

[26] There is no ambiguity or misapprehension here as to what was appealed against here. There was only one decision of the High Court at Johor Bahru delivered on 6 May 2021 involving the parties that the appellant is appealing against. If it is so vague, uncertain, confusing and ambiguous, then the respondent should have filed its application to strike out the appeal upon being served with the notice of appeal, rather than making the application in encl 14 on 27 September 2021 after some 53 days from being served with the record of appeal including the appellant's memorandum of appeal, before it filed encl 54 on 23 May 2022 which is the amended motion to strike out this appeal.

[27] Learned counsel for the respondent also took umbrage that the notice of appeal had not stated if the appeal against the decision is for an interlocutory matter or after full trial as required under para 3.4 *Arahan Amalan Mahkamah Rayuan Bil 1 Tahun 2017.* The said para 3.4 of the Practice Direction reads as follows in its original language:

3.4 Notis Rayuan bagi kes sivil hendaklah menyatakan dengan jelas sama ada rayuan adalah terhadap keputusan bagi permohonan interlokutori atau selepas perbicaraan penuh. Borang 1 (Notis Rayuan) Kaedah-Kaedah Mahkamah Rayuan 1994 hendaklah dipatuhi.

[28] Learned counsel for the respondent submitted that the appellant's notice of appeal is ambiguous, doubtful, defective and bad in law and should be dismissed *in limine*. We disagree. It would be tantamount to using a machete to kill a fly. It is an irregularity that is curable and in the circumstances of this appeal where there are no decisions on any interlocutory applications, the confusion of the respondent is more imaginary rather than real.

[29] The respondent had earlier filed its notice of cross-appeal on 11 August 2021 with no difficulty whatsoever. Rule 103 of the RCA is clear in that no application to set aside any proceedings for irregularity shall be allowed if the applicant had taken fresh step in the proceeding after knowledge of the irregularity. It reads:

103 Application to set aside for irregularity when allowed.

No application to set aside any proceedings for irregularity shall be allowed unless *made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.* (Emphasis added.)

[30] Both on point of procedure as required under Form 1 and for practical purposes, it is sufficient if the questions of law are stated in the memorandum of appeal.

Whether the notice of appeal is bad in law and incompetent by virtue of s 40d(3) and the proviso to s 49(1) of the Land Acquisition Act 1960

[31] Learned counsel for the respondent argued that the land administrator as the appellant is barred from appealing against the High Court's decision by virtue of s 40D(3) and the proviso to s 49(1) of the LAA 1960.

Section 40D(3) of the LAA 1960 reads:

(3) Any decision made under this section is final, and there shall be no further appeal to a higher court on the matter.

[32] It was further argued that there can be no appeal against the High Court's decision which comprises an award of compensation which decision is final and non-appealable under s 68(1)(d) of the CJA and hence this court lacks in jurisdiction. Section 68(1)(d) of the CJA reads:

68 Non-appealable matters.

(1) No appeal shall be brought to the Court of Appeal in any of the following cases:

A (d) *where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.* (Emphasis added.)

[33] To set the record straight, s 40D has been declared unconstitutional by the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526; [2017] 4 MLRA 554. The Federal Court noted in *Pentadbir Tanah Daerah Johor Bahru v Nusantara Daya Sdn Bhd* [2021] 4 MLJ 570 at [71] that it is unfortunate that the provision has not hitherto been repealed.

[34] As for the bar against appeal, that is found in the proviso to s 49(1) of the LAA. Section 49(1) permits an appeal to the Court of Appeal and thereafter to the Federal Court without the need for leave of the Federal Court from a decision of the Court of Appeal except where the decision compromises an award of compensation. See also the Federal Court case of *Syed Hussain bin Syed Junid & Ors v Pentadbir Tanah Negeri Perlis and another appeal* [2013] 6 MLJ 626; [2013] 6 MLRA 551. Section 49(1) reads:

> 49 Appeal from decision as to compensation.
>
> (1) Any person interested, including the land administrator and any person of corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court:
>
> *Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.* (Emphasis added.)

[35] Learned counsel for the respondent had relied on *Syed Hussain Syed Junaidi* as authority for the proposition that the appeal is primarily against the additional compensation awarded by the High Court. It must be noted that the appellant there had appealed to the Court of Appeal on the decision of the High Court with respect to quantum of compensation expressed as 'additional compensation.' This is clearly reflected in the notice of appeal lodged by the appellants against the decision of the High Court which reads as follows:

> *NOTIS RAYUAN*
>
> Sila ambil perhatian bahawa perayu-perayu/pemohon-pemohon yang ke 2, 4, 16, 17, 18, 26, 27, 35, 36 dan 38 dalam perkara di atas tidak berpuas hati dengan keputusan Yang Arif Pesuruhjaya Kehakiman TUAN MOHD ZAKI BIN ABDUL WAHAB yang diberikan di Mahkamah Tinggi Malaya di Kangar yang bersidang di Alor Setar *merayu kepada Mahkamah Rayuan Malaysia terhadap keseluruhan keputusan tersebut mengenai pampasan tambahan.* Bertarikh pada 23 Mei 2011.

[36] Thus the Federal Court had no compunction in holding as follows:

> [24] From the underlined passage it is clear that the appeal herein is against the amount of compensation awarded. In our considered view, the appeal herein is

nothing more than an attempt to circumvent the salient provisions of ss 40D and 49(1) of the LAA which precludes any party from appealing against the award of compensation.

[37] Therefore the bar to appeal is not absolute for s 49 allows *all* appeals 'except' for those where the High Court's decision comprises an award of compensation. In other words, it is not a ground of appeal that the award is excessively high or inadequately low. The Federal Court in *Semenyih Jaya* at [155] has interpreted this provision to mean that 'there is no bar to appeal; on questions of law'. The Federal Court speaking through Zainun Ali FCJ observed as follows:

> [155] To sum up, the proviso to sub-s 49(1) of the Act does not represent a complete bar on all appeals to the Court of Appeal from the High Court on all questions of compensation. Instead *the bar to appeal in sub-s 49(1) of the Act is limited to issues of fact on ground of quantum of compensation. Therefore, an aggrieved party has the right to appeal against the decision of the High Court on questions of law.* (Emphasis added.)

[38] This was further reaffirmed recently in the Federal Court case of *Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat* [2021] 4 MLJ 1; [2021] 2 MLRA 19 where the compensation awarded by the High Court in a land acquisition matter was disputed on appeal. the Federal Court speaking through Vernon Ong FCJ at paras [45] and [46] of the judgment held that:

> [45] Section 49 provides that any person may appeal from a decision of the High Court to the Court of Appeal and to the Federal Court. However, it is important to note that the appeals must not relate to a decision which comprises an award of compensation: see proviso to s 49(1). To underscore the finality of decisions on compensation, it is further stipulated that there shall be no further appeal on the matter: see s 40D(3). Insofar as the High Court's decision is a decision on compensation, that there shall be no appeal to the Court of Appeal is acknowledged by sub-s 68(1)(d) of the CJA 1964 which stipulates in clear and unequivocal terms that no appeal shall be brought to the Court of Appeal where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final (see also *Semenyih Jaya* at paras [135]–[139] and [140]–[155]). What Is A Question Of Law?
>
> [46] *It follows from the preceding paragraph that appeals to the Court of Appeal and to the Federal Court may only be mounted on questions of law.* (Emphasis added.)

[39] Again in *Pentadbir Tanah Daerah Johor v Nusantara Daya Sdn Bhd* [2021] 4 MLJ 570; [2021] 4 MLRA 466, a case involving an appeal on the ground that, the appeal to the Court of Appeal was incompetent under s 49(1) of the LAA as it was an appeal against an increased compensation by the High Court, the said bar to appeal on the award of compensation was reiterated by Mary Lim Thiam Suan FCJ as follows:

A

> [58] Consistent with that approach, the circumstances and meaning of what may amount to a 'question of law' under the proviso to s 49(1) must also be 'narrowly and strictly construed'; that the definition must not be extensive as it would undermine the clear intent of the proviso to s 49(1) — *that there is no right of appeal in respect of decisions comprising an award on compensation.* (Emphasis added.)

B

[40] If in answering the question of law raised, the award of compensation is increased or reduced, that is merely its unintended consequence and the appeal is not incompetent as such.

C

[41] Any objection to the appeal being incompetent as in that there is no question of law raised that could be discerned from the memorandum of appeal, should more properly be raised at the substantive hearing of the appeal especially when the respondent raising it has a cross-appeal.

D

[42] It may be raised as a preliminary issue at the hearing of the substantive appeal as was observed in *Neoh Choo Ee & Co Sdn Bhd v Vasalamany Govindasamy & Anor* [2002] 2 MLRA 486 as follows:

E

> If upon reading the memorandum of appeal and the record of appeal as a whole the High Court comes to the conclusion that the appeal does not involve a question of law, then *it would no doubt deal with the point in the ordinary way, when the appeal is called on for hearing.* (Emphasis added.)

F

[43] Unless the objection raised is so patent that it would be a complete waste of time and energy to allow an appeal to proceed further, an attempt at striking out can only consume more of the court's time especially when the striking out is dismissed, requiring the parties to again prepare for the appeal on the substantive merits of the appeal. It may even dissipate more time and energy when the dismissal is taken up on further appeal to the Federal Court as in this case, though we appreciate that it is the respondent's right to do so.

G

[44] Thus, even in the Federal Court's case of *Amitabha Guha* and *Nusantara Daya*, the objections by the respective respondents that were made pursuant to the proviso to s 49(1) were made at the substantive appeal hearing at the Court of Appeal.

H

[45] In *Amitabha Guha*, the respondent lodged a preliminary objection at the hearing, while in *Nusantara Daya*, the respondent took up his objection in the course of submissions at the appeal hearing.

I

[46] We agree with learned counsel for the appellant that a question of law under s 49(1) is an issue that demands time for considered deliberation and it would thus be wise, on the facts of this case, to unpack this objection at the substantive hearing of the appeal.

Whether the questions as stated in the memorandum of appeal are questions of law for the purpose of the appeal

[47] Learned counsel for the appellant submitted that the grounds of appeal as set out in his memorandum of appeal are *not* complaints against the High Court judge's award of compensation. It was emphasised that in fact complaints were against the High Court judge acting in excess of her jurisdiction or power. The grounds set forth in the memorandum of appeal are set out below:

Memorandum of appeal

(1) the learned Judicial Commissioner erred in law when she exceeded her *jurisdiction* or power by awarding the respondent compensation for severance, which was not claimed by the respondent in its Form N of the Land Acquisition Act 1960.

(2) the learned Judicial Commissioner erred in law when she delivered her decision without recording, the respective written opinions of the assessors, in breach of s 40C of the Land Acquisition Act 1960.

(3) the learned Judicial Commissioner erred in law in allowing the respondent's claim for damages for *trespass*.

(4) the learned Judicial Commissioner erred in law when she resolved to unelect for the respondent or supplanted the choice already made by the respondent with one of her own, despite having found the respondent to be bound by the doctrine of election in common law or in equity.

[48] Learned counsel for the appellant explained that for ground No 1, it is a complaint against the High Court judge acting in excess of her jurisdiction or power. The Federal Court, again in *Semenyih Jaya*, ruled that such complaints by an appellant are unencumbered by the *proviso* to s 49(1).

[49] Learned counsel for the appellant explained that with respect to ground No 2, it is the appellant's complaint against non-observance by the High Court judge of the protocols of s 40C. The Federal Court in *Semenyih Jaya* at [173] and [178]–[180] categorically held that such non-observance taints the High Court judge's decision and that such an award ought to be set aside as s 40C is a mandatory provision; it is a peremptory order that must not be breached. It reads:

[173] Thus *by* s 40C *of the Act, the opinion of each of the assessors on compensation are to be made in writing and are to be recorded by the judge.* It is evident that the relevant provisions brought about by Act A999, attempted to strike an appropriate balance between finality of decision which bars appeals against quantum of compensation and the procedures for hearing described under the Act before the judge can arrive at an appropriate amount of compensation. The provisions in the Act serve to

protect the rights and interests of interested persons in matters arising out of the compensation.

...

[178] *We are of the view that non-compliance with* s 40C *of the Act amounts to a misdirection which merits appellate intervention. In the present case, the court's decision appears to be incomplete in that although it was attested to by the assessors, it contains no opinion in relation to the decision, as envisaged by s 40C of the Act.* The appellant's constitutional right to a fair and reasonable compensation arising from compulsory acquisition has been violated because the statutory safeguards to determine the amount of compensation awarded as stated in s 40C of the Act was not complied with.

[179] Case laws have shown that breaches of peremptory orders would suffer the fate of it having to be set aside. In *Lee Ah Mok & Ors v Pentadbir Tanah Daerah Seremban & Anor* [2009] 5 MLJ 422; [2008] 3 MLRA 377 for instance, the Court of Appeal held that an order made in contravention of s 45 of the Act 'was tainted' and ought to be set aside.

[180] Similarly, the contravention of s 40C of the Act should attract the same legal repercussion, as s 40C is a mandatory provision of the Act. (Emphasis added.)

[50] We see no good reason why the above questions are not question of law which are properly allowed in an appeal to the Court of Appeal on questions of law.

Whether the 'one-day late service' objection of the record of appeal is curable

[51] Rule 18(7) and r 18(9) of the RCA do say as follows:

(7) The memorandum and copies referred to in subrule (4), which together shall be called the record of appeal, shall be filed at the Registry within ninety days from the date on which the decision appealed against was given.

...

(9) The appellant shall within the time limited for the filing of the record serve a copy thereof on each party who has been served with the notice of appeal.

[52] While all rules of the court are to be complied with, the law is not so inflexible as to bar completely an appeal merely because the service of the record of appeal is a day late. The court always has a discretion to extend or enlarge time for a minor non-compliance provided no serious prejudice had been caused. Thus r 93 of the RCA provides as follows:

93 Power of Court or judge to enlarge or abridge time.

The Court or a judge shall have power to enlarge or abridge the time appointed by these Rules, or fix by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as *the justice of the case may require*, and any such enlargement

may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these Rules or by any direction on or under the summons for directions or by an order of the Court or a judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application. (Emphasis added.)

[53] Here the notice of appeal and record of appeal were both filed on time. The delay of one day in service of the record of appeal cannot be prejudicial to the respondent at all. The respondent was already conscious of the fact that there was an appeal filed.

[54] In fact, most solicitors would not even raise the objection of a one-day delay in service and many would not object to an application made to extend time to file the memorandum of appeal or to deem what had been filed and served to have been validly filed and served. Rule 94 of the RCA allows for enlargement of time by consent in writing, obviating the need to make an application to the court or a judge.

[55] Indeed, it would be disproportionate to dismiss the appellant's appeal based on his one-day delay in serving its record of appeal on the respondent especially when the respondent had filed its encl 18 motion for enlargement of time to regularise that one-day late service, before his appeal has been set down for hearing.

[56] Under r 18(7) of the RCA, the deadline to file and serve the record of appeal was on 4 August 2021 or 90 days from the date of the decision of the High Court on 6 May 2021. Unfortunately, it was served on as in received by the respondent's solicitors by POS Laju on Thursday, 5 August 2021, despite it having been posted eight days earlier on Tuesday 29 July 2021. See encl 19 at p 87 of the affidavit in support and in reply of the appellant affirmed by one Sufian bin Suleiman dated 13 October 2021.

[57] Learned counsel for the appellant had drawn our attention to the *Arahan Ketua Hakim Negara Bil 08/2021* that no objection as to time should be made where the time for doing something has been lost to the Movement Control Order ('MCO') period which began from 1 June 2021.

[58] The respondent was not prejudiced as it had already been served with the record of appeal on 5 August 2021, some 53 days prior to respondent filing, on 27 September 2021, encl 54 which is its amended motion to strike out the appellant's appeal.

[59] In *National Union of Bank Employees v Director General of Trade Unions & Anor* [2013] 6 MLJ 167 at para [27], Justice Arifin Zakaria CJ said:

> ... [27] In the present appeal, *the application for extension of time was made before the hearing for the judicial review application* and the *respondents were not prejudiced by this application as they had been duly served with all the cause papers prior to the application itself.* In exercising its discretion, the court must have regard to justice. This is in line with the provision in O 1A of the RHC (see *Maxwell v Keun* [1928] 2 KB 645 *Walker v Walker* [1967] 1 WLR 327). (Emphasis added.)

[60] In the present case the appellant had entrusted the service of the appeal record to the POS Laju Malaysia eight days earlier and possibly because of the pandemic, it was unfortunate that the postal authority took more than eight days to deliver it to an office not more than 20km away.

[61] Following the case of *Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424 in taking into consideration the factors such as the reasons for the delay, the length of the day, the chances of the appeal succeeding and the prejudice if any suffered by the respondent, we have no hesitation in granting the enlargement of time of one day prayed for.

[62] Even for a longer delay, the Supreme Court in *Lee Guat Eng v Tan Lian Kim* [1985] 2 MLJ 196 had allowed an extension of time of 21 days for the late service of the record of appeal on the respondent; the notice of appeal and the memorandum of appeal having both been filed on time.

[63] We note that the UK Court of Appeal in *Palata Investments Ltd and others v Burt & Sinfield Ltd and others* [1985] 2 All ER 517 at p 521 had observed as follows:

> ... we expressed the opinion that, in cases *where the delay was very short and there was an acceptable excuse for the delay, as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal will arise.* We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case. No doubt in some cases it may be material to have regard to the merits of the appeal, because it may be wrong, and indeed may be an unkindness to the appellant himself, to extend his time for appealing after he has allowed the time to elapse, to enable him to pursue a hopeless appeal. But this is not such a case.

[64] In the duel of litigation it is magnanimous to be gracious to each other for then the appeal could be fought on merits rather than having won on a technicality. After all the sword we wield is not that of an assassin but that of a gladiator.

[65] While not everything we do here in life may echo in eternity, yet a kind act is always recognised and remembered. Often in life and in legal battle, the most important thing may not be to have won but to have fought well.

Whether the 'memorandum of appeal' had failed to comply with r 18(1) of the Rules of the Court of Appeal

[66] The respondent claimed that the memorandum of appeal is too general or 'terlalu am' and thus not in compliance with r 18(1), and therefore this appeal should be struck out.

[67] We find merits in the appellant's argument that all three elements required by r 18(1) — namely: (a) the head of objection; and (b) the ground of objection; and (c) the point of law wrongly decided by the High Court judge are all reflected in each ground of appeal in the memorandum of appeal. For ground of appeal No 1, the head of objection concerns jurisdiction or power; the ground is that the High Court judge acted in excess of it; the point of law concerns Form N.

[68] As for ground of appeal No 2, learned counsel for the appellant submitted that the head and ground of objection are the protocol for assessors and breach of procedure respectively; whilst the point of law revolves around the construction of s 40C of the LAA.

[69] It hardly lies in the mouth of the respondent to say that the grounds of appeal are too vague and general as it had no problem filing its notice of cross-appeal. A cross-appeal is after all, an appeal on precisely the same point that the appellant is appealing on except that an opposite result is argued by the respondent instead.

[70] The feigning of ignorance would not find favour with the court. In *Tan Kim Beng & Ors v Datuk Yen Ying Pang @ Kenneth Yen Yin Pin & Ors* [2013] 4 MLJ 437 the Court of Appeal dismissed, pursuant to r 1A(1) of the RCA which is titled '1A. Court or judge shall have regard to justice', an identical objection raised since the respondent there never averred that it had problem understanding the grounds of appeal. the Court of Appeal held:

> [13] We note that the objection is that of non-compliance with r 18(1) in not specifying the error of law or of fact. It is not in the respondent's submission that the respondent was unable to understand the point raised and therefore unable to answer it, thereby occasioning an injustice to the respondent. We conclude, therefore, that the objection is purely upon a technicality, and not because such non-compliance occasions a substantial miscarriage of justice to the respondent as required by r 1A of the Rules of the Court of Appeal which provides:
>
> A court or judge shall not allow any preliminary objection by any party only on

A the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[14] In simpler language, the Rules are intended as the means to justice and not to be put ahead of it. We stress that the Rules are to be prevailed upon and applied solely to advance the cause of justice and to prevent miscarriage of justice, and not to be used merely as accessories in a martial arts dance. It wastes valuable time and defeats the primary purpose of a fair and just resolution of the matter between the parties.

C **[71]** Likewise, in the instant case, the respondent had never claimed in its affidavits that it was unable to comprehend the grounds of appeal in the memorandum of appeal. More importantly the respondent had not alleged, let alone shown, that it has suffered a substantial miscarriage of justice, as required under r 3A of the RCA which reads:

D 3A. Preliminary objection on the ground of non-compliance shall not be allowed.

A Court or judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or judge is of the opinion that such *non-compliance has occasioned a substantial miscarriage of justice.* (Emphasis added.)

[72] Even if this court is inclined to find that the memorandum of appeal is indeed too general, we would nevertheless allow the appellant to amend the memorandum of appeal for it would be disproportionate to order the appeal to be struck out in the circumstances of the case where the respondent had no problem filing in their notice of cross-appeal. See the Court of Appeal's decision in *Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557 at 560H in a similar approach to amendment of pleadings.

[73] However, we do not find such a decision to be necessary as the memorandum of appeal is sufficiently clear in setting the questions of law that constitute the grounds of appeal.

Whether the decision of the High Court has complied with s 40C of the LAA

[74] According to respondent, the appellant's ('Pentadbir Tanah Johor Bahru') appeal is devoid of merit since the assessors have furnished their respective opinions on 21 September 2021.

[75] It is mandatory for assessors to provide their respective written opinions to the High Court judge presiding over the land reference before the judge delivers his decision. This requirement is housed in s 40C of the LAA.

[76] The assessors must do so *before* the judge delivers his decision. According to the Federal Court in *Semenyih Jaya* at [187], s 40C demands transparency in the judge's decision-making process. The opinions must be recorded by him and he must be satisfied that the assessors have considered all pertinent matters before deciding. He must then inform the parties what was the advice that he received from the assessors. The bar to appeal in the s 49(1) *proviso* does not operate when s 40C is not complied with (see *Semenyih Jaya* at [182]).

[77] The Federal Court in *Semenyih Jaya* unequivocally ruled at [189] that non-observance of s 40C is tantamount to a misdirection by the High Court, thus rendering its decision invalid. the relevant paras [182] and [187]–[189] of the judgment is set out below:

> [182] Thus, in cases where there is failure to observe the procedure as set out in the Act as in the instant appeal, there is a breach of the safeguards provided for in art 13(1) of the Federal Constitution, of the principle couched therein, which is 'save in accordance with law'. *Can appeals be limited if there is non-compliance with* s 40C *of the Act? the answer must be in the negative. the bar to appeal in sub-s 49(1) does not operate when there is non-compliance with the statutory provisions of the Act.*
>
> ...
>
> [187] the importance of s 40C of the Act also lies in the transparency of the decision-making process. In the words of Viscount Simon LC in *Richardson v Redpath, Brown & Co Ltd*:
>
> > It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the judge's conclusion, for the latter to inform the parties before him what is the advice which he has received.
>
> The opinion of the assessors serves to inform the interested persons that the court has considered all issues brought before the court and sought professional views before arriving at its decision. *the provision in* s 40C *of the Act is also significant in view of the bar to appeal provided for in ssub-s 49(1) of the Act.*
>
> [188] The written opinion of the assessors also serves to facilitate the appellate courts in the event an appeal is filed. the advice given by the assessors in the High Court must be made available to the appellate courts.
>
> [189] In conclusion, s 40C of the Act forms an important component of the decision-making process in land reference proceedings. It sets out the requirements to be observed by the assessors and the judge before decision is arrived at. therefore, *non-observance of s 40C of the Act amounts to a misdirection of the court which renders the decision invalid. Suffice to say that for this reason alone, this appeal must be allowed.* (Emphasis added.)

[78] Learned counsel for the appellant submitted that case law and *Arahan Amalan Hakim Besar Malaya* 01/2017 has set out the following further stipulations and repercussions:

(a) that the opinions are to be given to the judge at the conclusion of proceedings: *Semenyih Jaya* at [118];

(b) that each assessor must state the appropriate amount of compensation in their written opinions: *Semenyih Jaya* at [119];

(c) that it would be prudent for the judge to attach those opinions to his grounds of judgment, as was done in *Shahrum Kazindin v Pentadbir Tanah Daerah Petaling, Selangor* [2019] MLJU 1376 at [21];

(d) that a decision signed by the judge and the assessors is *insufficient* without the judge *also recording* the assessors' opinions: *Siaw Swee Mie v Lembaga Lebuhraya Malaysia* [2019] 4 MLJ 406 at [44]–[45];

(e) that the High Court's decision is invalid and the entire land reference proceeding before it *is vitiated* if s 40C is not observed: *Semenyih Jaya* at [189] and *Siaw Swee Mie* at [46];

(f) that the assessors have no more role to play after giving their opinions: *Semenyih Jaya* at [122];

(g) that an appellate court must intervene where s 40C is not complied with. At any rate, *an appeal against non-observance of s 40C cannot be barred and must be heard: Semenyih Jaya* at [178]–[180], [182], [186]–[187] and [224(b)]; and

(h) that the role of assessors gained tremendous significance following the introduction of s 49(1) *proviso* via Act 486 limiting the right of appeal. Consequently, the assessors' opinions are vital and *the requirement for a judge to be guided by them is warranted by law as a judge is no expert in land valuation: Nusantara Daya* at [55].

[79] Learned counsel for the appellant submitted that the High Court judge's decision of 6 May 2021 order has to be set aside as s 40C was not observed in the instant case in the following:

(a) there was no written opinion rendered by either assessor *prior to* the judge delivering her decision on 6 May 2021;

(b) the brief decision at p 21 encl 4 appeal record signed by the judge and assessors *does not suffice* under s40C. See *Siaw Swee Mie* at [44]–[45];

(c) the opinions were only drawn up by the assessors and filed in the High Court on 21 September 2021 as encl 43 and 44 *well over 4 months after* the 6 May 2021 order or decision: see pp 11–20; pp 9–10 of encl 16 supp appeal record #2;

(d) the judge's grounds of judgment thus became a guide for those opinions instead of the other way around, thereby making a mockery of s 40C LAA1960 — it begs the question *who advised who*. See *Amitabha Guha*

at [50] and *Nusantara Daya* at [56]; and

(e) the compensation awards *cannot therefore be securely tested* to determine if they are well founded, more so here where the assessors were in agreement and the judge purportedly accepted their opinions *in toto.* See [41] grounds of judgment.

[80] We agree that the question as to what is sufficient compliance with s 40C and the effect of non-compliance is a question of law that should properly be heard at the substantive appeal. The respondent's striking out application is thus without merit and misconceived.

Whether the non-inclusion of the 'judge's notes' is fatal such that the appeal ought to be struck out

[81] The 'judge's notes of the hearing' may under r 18(4)(b) of the RCA consist of notes recorded by:

(a) wholly mechanical means; or

(b) partly by mechanical means and partly in handwritten form; or

(c) wholly in handwritten form.

[82] Rule 18(4)(b) reads:

> Memorandum of appeal
>
> ...
>
> (4) the appellant shall attach to such memorandum copies of the proceedings in the High Court, including —
>
> ...
>
> (b) a copy of the judge's notes of the hearing of the cause or matter in which the decision appealed against was given which may be recorded wholly or partly by mechanical means.

[83] Learned counsel for the respondent contended that the appellant had also failed to attach in the records of appeal the duly transcribed notes of proceeding or if it is not available, to attach the same in CD form as required under para 7.2 (*Penyedian Rekod Rayuan bagi Kandungan Bahagian B No (ii) Arahan Amalan Mahkamah Rayuan Bil 1 Tahun 2017* which reads in its original language as follows:

> Transkripsi nota keterangan Mahkamah Tinggi. Jika transkripsi nota keterangan tidak dapat difailkan atau tidak tersedia, nota keterangan dalam bentuk cakera padat (Compact Disc/CD) boleh difailkan tertakluk kepada arahan Mahkamah.

[84] The respondent also alleged that the appellant had not provided any evidence to show that it had applied for the notes of proceedings to be transcribed or that it had tried to obtain the court direction to file the same in CD's form.

[85] To be fair to the appellant, it had written to the judge's secretary for the 'judge's notes of the hearing' and the answer is that the 'judge's notes of the hearing' is the same as the grounds of judgment already given to the parties and so there is no payment needed from any parties for the 'judge's notes of the hearing'. The reply from the judge's secretary at p 25 encl 57 affidavit says it all. In its original language it reads:

> 2. Untuk makluman pihak puan setelah perkara ini diangkat dan dipanjangkan kepada Yang Arif Puan Evrol Mariette Peters selaku hakim yang mendengar kes tersebut, adalah disahkan bahawa nota yang disediakan oleh Yang Arif sendiri adalah sama dengan Alasan penghakiman sebagaimana yang telah diberikan kepada pihak-pihak. Oleh yang demikian tiada bayaran bagi mana-mana peguam untuk kes tersebut di atas mendapatkan nota yang disediakan oleh Yang Arif.
>
> Sekian untuk makluman jua. Terima kasih.

[86] We agree with learned counsel for the appellant that under the *Arahan Amalan Mahkamah Rayuan 01/2017* ('AAMR 01/2017'), the 'judge's notes of hearing' is not required as para 7.2 of 'Bahagian III: Rekod Rayuan dalam Rayuan Sivil' only the following are now required by *AAMR 01/2017* to be incorporated in every appeal record:

(a) index;

(b) chronology;

(c) memorandum of appeal;

(d) judgment;

(e) notice of appeal;

(f) grounds of judgment;

(g) pleadings; and

(h) notes of evidence or affidavits (depending on whether the appeal is after a full trial).

[87] We find merits in the appellant's argument that 'the judge's notes of the hearing' are inapplicable in the instant case as they are only applicable to appeals after a full trial with *viva voce* evidence which is not the case here: see *Arahan Amalan Mahkamah Rayuan 02/2011*.

[88] Even assuming for a moment that 'the judge's notes of the hearing' are required, it is still not fatal to the appellant's appeal as the reasons set about in 'the judge's notes of the hearing' would have already been incorporated into the judge's grounds of judgment unless it can be shown that the reasons given as reflected in 'the judge's notes of hearing' are different from the GOJ subsequently made available.

[89] Learned counsel for the respondent submitted on the importance of adhering strictly to RCA and the Practice Directions and referred to the case of *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389; [2002] 2 MLRA 298 where the Court of Appeal upheld a preliminary objection raised by the respondent on the non-compliance of RCA and the Practice Directions in relation to the filing of the record of appeal as follows:

> [24] In our judgment, the importance of the Rules of Court cannot be ignored as otherwise the courts will be faced with endless problems involving the administration of justice. Speaking of the importance of the Rules of Court, the learned judge, Chang Min Tat J (as he then was) in *Yu Oi Yong & Anor v Ho Toong Peng & Ors* [1977] 1 MLJ 120; [1976] 1 MLRH 335 had this to say (at p 121):
>
> > There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules.
>
> It should, I think, be realised by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.
>
> [25] In *Chua Choong Yin v Tan Boon Bak Trading Sdn Bhd & Anor* [2002] 4 MLJ 145; [2002] 1 MLRA 199; [2002] 3 CLJ 357; [2002] 3 AMR 3023 the Court of Appeal was faced with similar issues. there the respondent raised two preliminary issues namely non-compliance by the appellant with:
>
> (i) Practice Direction No 3 of 1992; and
>
> (ii) Rules 18(4)(c) and (6) of the Rules of the Court of Appeal 1994 ('the Rules').
>
> [26] Speaking through Siti Norma Yaacob JCA (as she then was) this is what the court said with respect to the first issue (at p 363):
>
> > Whilst we appreciate that practice directions do not have the force of law, they are created for a specific purpose, namely to regulate a systematic and consistent procedure governing the filing of appeal records. For that reason, they have to be adhered to otherwise chaos and uncertainty in the filing of appeal records shall prevail. See the cases of *Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54; [1995] 2 MLRA 349; [1996] 2 CLJ 628; [1996] 2 AMR 1399 and *Ling Siok Seng v Ting Sieh Chung* [1998] 4 MLJ 65; [1998] 1 MLRA 548; [1998] 4 CLJ 169; [1998] 4 AMR 3217 [2002] 2 MLR 302.

A [27] In dealing with the second issue the court there found that the appellant was in clear breach of r 18(4)(c) of the Rules when he included in his appeal records two prohibited (under court order) exhibits. the solicitors for the first respondent, by letter, pointed out to the appellant that the inclusion of the said exhs in his index of documents was in defiance of the court order but despite being put on notice, the B appellant insisted on including the offending two exhs and the fact of the first respondent's objection does not appear in the appeal records as required under r 18(6) of the Rules.

[90] We have not the slightest doubt as to the correctness of the above C proposition. However, we must always bear in mind the overarching consideration of justice. the default position is encapsulated in r 3A 'Preliminary objection on the ground of non-compliance shall not be allowed' and in the opening paragraph of r 102 of the RCA. As follows:

D 102. *Non-compliance with Rules not to render proceedings void. Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void* unless the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit. (Emphasis added.)

E

[91] No prejudice or substantial injustice has been shown which is not curable. the defect was thus curable under r 102 RCA. Steve Shim CJSS in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd* F [2002] 1 MLJ 385 at p 405 had the occasion to observe as follows:

However, *had the Court of Appeal considered r 102 of the RCA,* it would have taken note of the following salient facts; *that there was no dispute as to the contents of the order appealed against;* that the appellant had already filed and served the appeal record containing the photocopy of the sealed order; that the authenticity of the G photocopy of the sealed order was not in dispute; that the appellant had also filed and served the supplementary appeal record containing the certified true copy of the sealed order and in addition, the appellant had tendered a certified true copy of the sealed order at the hearing of the appeal in open court. *Given those factual circumstances, it would have concluded that the respondent had neither been misled nor prejudiced in any way notwithstanding the defect. there was no substantial miscarriage* H *of justice involved.* that being the position, the defect was certainly curable under r 102 of the RCA. *the Court of Appeal's failure to consider r 102 had adversely affected its decision in upholding the objection of the respondent.* On that basis, its decision was therefore flawed resulting in injustice to the appellant. (Emphasis added.)

I **[92]** We must always bear in mind that the rules of procedure are the handmaidens of justice and not the mistress of justice. They are there to facilitate the process of the appeal in this case and not to frustrate it for every minor infraction of the rules and more so, when in this case, through no fault of the appellant, it had not been furnished with the 'judge's Notes of the

hearing'. The rules of procedure are to be subordinated to the substantive justice of the case for they were introduced to ease and assist the litigants, not to trip and trap them.

[93] That is the whole tone and tenor of r 3A and r 102 of the RCA, setting the thrust for the trajectory of an appeal such that a preliminary objection on the ground of non-compliance shall not be allowed to derail its course unless there has been a substantial miscarriage of justice.

[94] In a similar vein, Mohtar Abdullah FCJ in *Megat Najumuddin* preferred to promote the prophylactic properties of the rules of procedure at p 426 as follows:

> It is very clear from these provisions of the RCA that the relevant documents, including the copy of the court order dated 20 October 1998 (the order appealed against) must be filed by the appellant within six weeks after the entry of the appeal or 'within such further time as the court may allow' which means, of course, that the appellant must apply to the Court of Appeal for leave to file the relevant document out of time. In short, on the facts of the present case, the appellant who has filed everything in time, except for that copy of the court order, must apply to the court for leave to file the said court order out of time. Rules are rules! they must be obeyed. Numerous judgments can be cited in support of this firm stand on the necessity for a strict adherence to the rules. I agree. However, *a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law. the judge should be mindful of r 102 of the RCA which provides that 'non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void.' the said rule also provides for the discretionary power of the judge to deal with such irregularity 'in such manner and upon such terms' as the judge thinks fit.* therefore, a fair minded judge should look at all the circumstances of the case before penalizing the party who infringes any particular rule of procedure. After all, r 18(7) of the RCA itself provides an avenue for the appellant to apply to the court for an extension of time. If the appellant fails to do so, he should not be peremptorily dismissed. the court should consider why the appellant acted in the manner he did. In this case, the appellant was relying on the Court of Appeal's own practice direction which allows alternative procedures for the filing or submission of the copy of the court order. the Court of Appeal should properly examine its own practice direction and consider the matter in the light of the RCA as modified by the practice direction. (Emphasis added.)

[95] Learned counsel for the respondent had also relied on *Nota Amalan 02/1991* erroneously stated as *Arahan Amalan 02/1991. Nota Amalan 02/1991* says as follows:

(1) an appellant must file his appeal record within six weeks;

(2) if he anticipates having to apply for an extension of time, he must within one week from filing his notice of appeal write to the High Court for notes of evidence;

(3) if those notes remain unavailable four weeks after he filed his notice of appeal, he shall apply by letter to the Supreme Court for extension of time;

(4) the Supreme Court may then grant a three-week extension from the time those notes are received by him;

(5) if no application is made to the Supreme Court as at (3) above, the Supreme Court may take that omission into consideration when deciding whether or not to grant an extension of time upon a motion being filed; and

(6) the appeal record must still be filed even in the absence of the grounds of judgment.

[96] It was issued by the then Supreme Court and it was concerned with applications for extension of time to file record of appeal in civil appeals. However, it had already ceased to have any force after it was repealed by *Arahan Amalan Mahkamah Persekutuan 01/2018.*

[97] The current r 18 of the RCA on memorandum of appeal reads as follows:

18 Memorandum of appeal.

(1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively.

(2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

(3) The memorandum of appeal shall be substantially in Form 3 in the First Schedule.

(4) The appellant shall attach to such memorandum copies of the proceedings in the High Court.

(5) Including —

(a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

(b) a copy of the judge's notes of the hearing of the cause or matter in which the decision appealed against was given which may be recorded wholly or partly by mechanical means;

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

(e) a copy of the written judgment or grounds of decision of the judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal; and

(f) a copy of the notice of appeal.

...

(6) The memorandum and copies referred to in subrule (4), which together shall be called the record of appeal, shall be filed at the Registry within ninety days from the date on which the decision appealed against was given.

(7A) Notwithstanding subrule (7), *if any copy of the documents specified in paragraph (4)(b), (d) or (e) is not available within ninety days from the date on which the decision appealed against was given, the appellant shall file the copy of the documents together with the memorandum of appeal as supplementary records of appeal within three weeks of being notified of its availability.*

(7B) Notwithstanding subrules (7) and (7A), if any copy of the documents specified in *paragraph (4)(b) or (e) is not available after ninety days from the date on which the decision appealed against was given, the court may order the appellant to proceed with his appeal.* (Emphasis added.)

[98] This court has a discretion in ordering and we so order that the appellant do proceed with the appeal without the 'judge's notes of the hearing' as the High Court had already stated that the judge's notes of the hearing are the same as the grounds of judgment furnished by the judge.

[99] Learned counsel for the respondent cited yet another case in *Joseph Lee Yok Min @ Ambrose v Mayban Securities Sdn Bhd, Ipoh Branch (formerly known as Philleoallied Securities Sdn Bhd) & Anor* [2014] 2 MLJ 848; [2018] 6 MLRA 458 where the non-compliance with the RCA was fatal but that was in the context of serious non-compliance with respect to the absence of the notes of proceedings, the grounds of judgment and the sealed order of the court. In the face of such serious breaches and the lack of an explanation to excuse the non-compliance, the Court of Appeal in dismissing the appeal observed as follows:

[7] On the second issue, there can be no doubt that the record of appeal is incomplete as it does not contain:

(i) notes of proceedings;

(ii) grounds of decision; and

(iii) sealed order dated 12 January 2006.

[8] The appellant has not shown any proof that he had applied for the three items above. According to Practice Direction No 2 of 1991, one week after the notice of appeal is filed, the appellant has to apply to the judge's secretary to be supplied with a copy of the notes of proceedings. In the circumstances, in our judgment, the non-compliance with the Practice Direction and r 18(4) (b), (d) and (e) of the Rules of the Court of Appeal 1994, *where copy of the judgment appealed from, notes of proceedings and grounds of judgment was not included in the record of appeal, was not an irregularity but a nullity* (see: *Chuah Tim Lan v RHB Bank Bhd & Anor* [2008] 2 MLRA 265 and *Capital Insurance Bhd v Kasim Mohd Ali* [1999] 1 MLRA 572).

[9] For reasons aforesaid, the first respondent's preliminary objection was upheld. We held that *the record of appeal is defective; it tantamount to no record of appeal having being filed. On this ground alone, this appeal must be dismissed with costs.*' (Emphasis added.)

[100] At any rate, the application of *Nota Amalan 02/1991* must be confined to situations where an appellant is applying for extension of time to file a supplementary appeal record which is not the case here. For the respondent to insist on the appellant filing what it does not have because the High Court had not seen fit to furnish it, would be to ask the appellant to do the impossible and clearly the RCA does not require that.

Whether the objection on the ground that 'separate volumes' of appeal record were not filed is valid in the circumstances of the case

[101] Paragraph 7.1(a) of the *AAMR 01/2017* provides in its original language as follows:

Perayu hendaklah menyediakan 4 salinan Rekod Rayuan seperti yang berikut:

(a) bagi rayuan daripada Mahkamah Tinggi, Rekod Rayuan hendaklah ternahagi kepada Bahagian A, Bahagian B and Bahagian C; dan ...

[102] Paragraph 7.3 (a) to (e) of the *AAMR 01/2017* provides in its original language as follows:

7.3 Bahagian A, B, C dan D hendalah seperti yang berikut:

(a) dibahagikan kepada 3 Jilid dan dinyatakan:

JILID	BAHAGIAN
1	A
2	B dan C
S	D

(b) setiap Jilid tidak boleh melebihi 200 muka surat;

(c) jika mana-mana Jilid melebihi 200 muka surat, setiap Jilid hendaklah dibahagikan dan dinyatakan sebagai contohnya Jilid 2A, 2B dll. Setiap Jilid hendaklah mempunyai indeks yang jelas dan terperinci;

(d) setiap muka surat yang dinomborkan hendaklah disusun secara berturutan bermula daripada muka surat pertama di Jilid 1; dan

(e) jika jumlah muka surat bagi Rekod Rayuan adalah kurang daripada 50 muka surat, kesemua tiga Jilid boleh digabungkan menjadi satu Jilid sahaja yang mengandungi Bahagian, A, B, C dan/atau D.

[103] It goes on to say at para 7.3 that Part D is irrelevant for our instant case as that is only meant for appeals from the sessions court.

[104] Reading (b), (c) and (e) above, there may well be situations where Parts A and B and C may be merged, whether into one or more volumes. The implication is that there is no rigid or inflexible precept that requires Part A to be separated from Parts B and C. Neither is there any prohibition against Part B being compiled in a volume separate and distinct from Part C.

[105] What the appellant had done is to merely merge Part A and Part B and (a few documents from) Part C in the volume: see encl 4 appeal record. The reason the appellant did so was because Part A only had *15 ps*, while Part B had *none.* The appellant incorporated *186 ps* from Part C into that first volume that had Part A (27 ps) and Part B (nil).

[106] We cannot see how the appellant's chosen method of compilation is fatal to its appeal. The respondent had not objected to this compilation upon being served with the appeal record. the respondent, on the other hand, had taken several fresh steps in filing the following:

(a) notice of cross-appeal in encl 7;

(b) motion in encl 14 motion and three affidavits and two written submissions;

(c) filed four written submissions and three affidavits to oppose the appellant — Pentadbir Tanah's encl 12 and encl 18 motions.

[107] All these steps were taken well before the respondent filed its present encl 54 amended motion to object to that irregularity. Taking fresh steps after knowing of the irregularity is fatal to the respondent's application to strike out the notice of appeal. Rule 103 of the RCA reads as follows:

> 103. Application to set aside for irregularity when allowed.
>
> No application to set aside any proceedings for irregularity shall be allowed unless made *within reasonable time,* nor if *the party applying has taken any fresh step after*

knowledge of the irregularity. (Emphasis added.)

[108] The objection is frivolous and without merits and hence dismissed.

Whether the respondent's notice of cross-appeal should be struck out

[109] The appellant in encl 18 when praying for an enlargement of time to serve the record of appeal which was found to be late by one day, had also prayed for the respondent's notice of cross-appeal in encl 7 to be struck out. Perhaps it was more of a strategic move by the appellant in that if its notice of appeal is struck out then the respondent's notice of cross-appeal ought to be struck out as well; a case of the best defence is an offence.

[110] However, the desire to live and to keep the appeal alive was stronger than the dire consequence of having the life in the appeal being snuffed out. Sensing perhaps that the court would be quite prepared to allow the enlargement of time, learned counsel for the appellant was prepared to withdraw the second prayer after it was pointed out that the two prayers being distinct from each other, the proper procedure would be to file a separate application for the striking out of the notice of cross-appeal.

[111] The considerations for enlargement of time under r 93 of the RCA are quite different from that of striking out a notice of cross-appeal and hence undesirable to lump two separate applications to be lumped into one application. See the Court of Appeal case of *Jacy ak Tintang & Anor v Mayan ak Nayang* [2022] 6 MLJ 153 at para [59].

> [59] It is also germane to observe and it is also not disputed that *the appellants had filed in one application seeking to be made co-defendant pursuant to O 89 r 5 and at the same time made an application to intervene under O 15 r 6 of the ROC 2012. It is trite that the requirements for each application are different.* the requirements for an application to intervene under O 89 r 5 are separate from that of an application under O 15 r 6. Under O 15 r 6 requires the appellants to have legal interest. We are of the view that given the different legal consideration that underlies each application it is undesirable for two separate applications to be lumped into one notice of application. (Emphasis added.)

[112] The considerations for enlargement of time would be whether the delay of one day in service of the record of appeal would cause any substantial injustice to the respondent whereas that of striking out the notice of cross-appeal would be whether it is connected to the findings and decisions appealed against by the appellant and not a case where it seeks to reverse or set aside the said findings or decisions.

[113] We had therefore dismissed the prayer in encl 18 to strike out the notice of cross-appeal. there has been no appeal by the appellant on this decision of the court. Be that as it may we would like to make some observations which may help to clear some misconceptions on the true nature of a notice of cross-appeal and its effect if the notice of appeal of the appellant is withdrawn or struck out.

[114] The respondent in its notice of cross-appeal had raised the following:

(a) that the High Court ought to have awarded interest at 8%pa instead of 5%pa;

(b) that the High Court was wrong to award a nominal sum of RM10 for land already earmarked as road reserve, measuring 2,989.89m2; and

(c) that the High Court was wrong to award RM1.1m for injurious affection compensation for 2,669.93m2 when the respondent had claimed RM6.8m (or RM6.3m plus RM512,000) for 3,264.93m2.

[115] To recap and recall, the above questions of law do not seek to vary what the appellant had raised in its memorandum of appeal. the memorandum of appeal had raised the following:

(a) the lack of jurisdiction or power of the High Court in awarding the respondent compensation for severance, which was not claimed by the respondent in its Form N of the Land Acquisition Act 1960;

(b) the fatal non-compliance with the strict procedure under the LAA in that the High Court's decision was delivered without recording the respective written opinions of the assessors, in breach of s 40C of the LAA;

(c) the error of law in allowing the respondent's claim for damages for trespass; and

(d) the error of law when High Court resolved to unelect for the respondent or supplanted the choice already made by the respondent with one of its own, despite having found the respondent to be bound by the doctrine of election in common law or in equity.

[116] It can thus be seen that the respondent's grounds of cross-appeal do not relate to and indeed are unconnected to the grounds of appeal of the appellant as evident in its memorandum of appeal. As such the respondent should have filed its own separate notice of appeal on time and not a notice of cross-appeal.

[117] In *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor* [2016] 3 MLJ 365 the Court of Appeal explained that:

A

> [77] a cross-appeal is only meant for *variation of 'the decision' appealed against* and *not for variation, reversal or setting aside of any other decision of the High Court unrelated to the appeal filed by the appellant.* (Emphasis added.)

B

[118] The seminal case on this minefield of error arising out of a misconception as to the true nature of a notice of cross-appeal is the Federal Court case of *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557. The plaintiff there had appealed against the High Court's order to grant damages instead of a prayer for specific performance even though it had held that the sale and purchase agreement of a golf course land was a valid

C

agreement between the first and second defendant and that the third defendant was not a bona fide purchaser. the plaintiff was aggrieved by the decision of an award of damages and they appealed on ground that they should be entitled to specific performance. The first defendant filed a cross-appeal by which it intended to reverse the entire decision of the High Court.

D

[119] Before the Court of Appeal, the plaintiff/appellant raised a preliminary objection against the first defendant's appeal. The plaintiff argued that the effect sought by way of the first defendant's cross-appeal was to set aside the finding of the High Court that there was a concluded contract. It was thus the

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plaintiff's contention that the first defendant sought to raise matters which were unconnected with its appeal, which was only against a part of the judgment ie that no specific performance had been ordered. The plaintiff argued that the first defendant's appeal should have been filed by way of a

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notice of appeal and not by way of a notice of cross-appeal. The Court of Appeal agreed with the plaintiff and ruled that the cross-appeal should have been restricted to vary that part of the order that was being appealed by the plaintiff and should not be permitted to seek to reverse any other aspects of the decision of the High Court. the first defendant obtained leave to appeal to the Federal Court and the Federal Court held as follows:

G

> [23] We are of the view that under r 8 of the RCA 1994 the first defendant cannot set aside the substantive finding of facts made by the High Court by way of notice of cross-appeal. the first defendant may only set aside the substantive findings of the High Court by way of filing a notice of appeal under r 5 of the RCA 1994. Only an appeal by way of a notice of appeal constitutes a re-hearing. Rule 8 of the RCA 1994 does not state that a notice of cross-appeal '... shall be by way of re-hearing'. *Rule 8 of the RCA 1994 only provides that a respondent could only contend that the decision of the High Court should be varied if the respondent files the notice of cross-appeal within ten days after the service of the record of appeal.*
>
> ...
>
> [31] the Court of Appeal in the present case had rightly applied the principle enunciated in the English case of *Re Cavander's Trusts* (1881) 16 Ch D 270 which states that an appeal on a point which does not affect the original appellant cannot be by a cross-appeal. In other words, where the respondent wishes to raise matters which are unconnected with the substance of the appeal A by the appellant the

H

I

respondent must proceed by way of a separate notice of appeal.

...

[36] It would appear that none of the parties in this case appealed against the entire decision of the High Court. the first defendant had failed to appeal against the finding of the High Court that the HK MOU was a binding contract. *The High Court's decision that there was a valid and binding agreement concluded between the plaintiff and the first defendant is adverse against the first defendant. It was thus incumbent on the first defendant to file a separate notice of appeal if it wanted the aforesaid decision to be reversed or set aside, rather than by filing a notice of cross-appeal.* the operative words of 'to contend' and 'decision of the High Court should be varied' under *r 8(1) of the RCA 1994 clearly limits the contentions under a notice of cross-appeal to effectively vary a decision,* not set aside a judgment or order. *It is incumbent on the first defendant to independently file a notice of appeal under r 5 of the RCA 1994 to rehear the issues that were not decided in the first defendant's favour.* A notice of cross-appeal does not provide for a complaint to be re-heard. the first defendant is at liberty to file an independent appeal under s 67(1) of the CJA 1964. (Emphasis added.)

[120] We agree with learned counsel for the appellant that the respondent may only cross-appeal against a point already in issue in a valid appeal since the cross-appeal derives its life from that appeal. Thus, where a High Court has rejected a respondent's argument and such a rejection results in a decision adverse to the respondent for which the respondent is aggrieved, then the respondent must file a separate notice of appeal and not a cross-appeal if the respondent wishes to reverse or set aside that decision. Likewise, if a respondent wishes the Court of Appeal to rehear the issues that were not decided in that respondent's favour, then that respondent must file an independent and separate notice of appeal.

[121] All that we have observed above is of course circumscribed by the need of the respondent to ensure that the questions of law are genuine questions of law and not a case where the real complaint is on the insufficient of the compensation awarded.

[122] the respondent may want to apply for an extension of time to file its separate notice of appeal if it is minded to. The valued principle in life that we should not do unto others what we would not like others to do unto us, which is not to unnecessarily object to extension or enlargement of time that does not seriously prejudice the objector, may now resonate with learned counsel. Perhaps the appellant would still be magnanimous in not objecting.

[123] We had asked the learned counsel for the respondent if it is serious with its cross-appeal to which he confirmed that he was serious irrespective of what we would decide with respect to its application to strike out the appellant's

notice of appeal. We pause to reiterate that a notice of cross-appeal filed by a respondent derives its life from the notice of appeal filed by the appellant. The Federal Court in *Kabushiki Kaisha Ngu* had explained as follows:

> [32] The principle enunciated in *Re Cavander's Trusts* has been widely referred with approval across the Commonwealth jurisdiction. In the New Zealand's case of *In re Parker (Deceased) Crow v Weston* [1948] NZLR 9 at pp 11–12 the Court of Appeal in Wellington held that:
>
> > the cross-notices on appeal are accordingly out of time: R 6 of the Court of Appeal Rules; and see *Re Cavander's Trusts. Each could be good as a cross-appeal only with regard to a point already in issue in a validly-existing appeal. the cross-notice on appeal is not of itself sufficient to set an appeal on foot, as it derives its validity from the appeal.* All the parties were aware of the facts, and should have been on their guard; and they should have protected themselves by one of them giving formal notice, of appeal when a respondent has given notice and the appellant withdraws a validly-existing appeal, the respondent may elect to proceed with or to withdraw his notice: *the Beewing;* but here there is no validly-existing appeal If the cross notices were in time and held to be good even though the appeal was bad, and the appellant were still allowed to proceed on such cross-notices under R 6 (as to which there is no time-limit), this would render nugatory the whole purpose and effect of R 19. the notice under R 6 is only effective as to matter raised by the appeal itself, and *if any matter is to be raised by the respondent on appeal that is not in issue as a result of the appellant's notice of appeal: a substantive appeal must be lodged by such respondent.* (Emphasis added.)

[124] The Federal Court in a later case in *Douglas Ding Jangan & Ors v Kerajaan Negeri Sarawak & Ors* [2021] 4 MLJ 946 had reaffirmed the principle set out in at *Kabushiki Kaisha Ngu* as follows:

> [33] Juxtaposed with the facts of the present case, the High Court's finding that the appellants have acquired and/or created communal NCR over the cleared areas, which formed the basis for its decision to allow para 25 (i) of the statement of claim, was a finding that was wholly averse to the first to fifth respondents. *It was therefore incumbent on the first to fifth respondents to file separate notices of appeal if they wanted the decision to be reversed or set aside. the decision cannot be reversed or set aside by way of cross-appeal under r 8 of the RCA. It can only be done by way of a substantive appeal under r 5.*
>
> ...
>
> [35] It will immediately be seen that although the notices of cross-appeal sought for a variation of the High Court decision allowing para 25(i) of the statement of claim, the grounds in support of the cross-appeals in fact sought for a completely different order. Far from asking for a variation of the decision, the respondents were actually seeking for an order that the entire decision of the High Court to allow para 25(i) of the statement of claim be reversed or set aside.
>
> [36] For all intents and purposes, the notices were notices of substantive appeal under r 5 of the RCA disguised as notices of cross-appeal under r 8. This is clear

from the contents of the notices and made clearer by the basis on which the cross-appeals were filed — that there is no evidence to support the learned trial judge's finding that the appellants and/or those whom they represent have acquired and/or created NCR over the cleared areas or some patches of the cleared areas shown in exh D80 or D81 or both D80 and D81, contrary to the finding of the High Court.

[37] We do not find it to be correct in law for the respondents to mount such collateral attack on the decision of the High Court without filing notices of appeal of their own under r 5 of the RCA. *A cross-appeal under r 8 of the RCA is only for the purpose of varying the decision of the High Court that is appealed against by the appellant and not for the purpose of reversing or setting aside any decision of the High Court which no party to the action appeals against.* the cross-appeal must relate to the appeal brought by the appellant and not otherwise and no variation order under r 8 of the RCA can be made in respect of a non-existent appeal.

[38] It is important to keep in mind that there was no appeal filed by the appellants nor by the first to fifth respondents against the decision of the High Court allowing para 25(i) of the statement of claim. the appellants' appeal was against the decision to dismiss their claim for the balance of the land areas other than the cleared areas. there was therefore nothing to vary in terms of r 8 of the RCA in respect of the decision of the High Court to allow para 25(i) of the statement of claim. (Emphasis added.)

[125] It is a case of one should be careful of what one wishes for — in this case if the respondent wants the appellant's appeal to be struck out then the respondent's cross-appeal would fall with it as a cross-appeal derives its life and validity from a notice of appeal. It is a case of one cannot kill the other without being killed in the process.

[126] Little wonder that when an appellant withdraws its appeal, the respondent who has not given notice of cross-appeal, may under r 10 of the RCA give notice of appeal and proceed therewith in the manner prescribed by the rules as follows:

10 Notice of appeal by respondent where notice of appeal withdrawn or appeal not entered

Where an appeal is withdrawn under r 9, or where an appeal of which notice has been given is not entered within the time limited, *any respondent who has not given notice of cross-appeal may give notice of appeal* and proceed therewith in the manner prescribed by the foregoing rules; but in any such case the times limited for giving notice of appeal, entering the appeal, furnishing security for costs, and filing and serving the record of appeal may, on application to the Court or if the appeal has not been entered, to a judge of the High Court, be extended so far as is reasonably necessary in all the circumstances of the case. (Emphasis added.)

[127] In a case where the respondent had given its notice of cross-appeal but the appellant had failed to get its appeal ready by filing its record of appeal, the

respondent under r 19 may proceed with his cross-appeal. In such a case the respondent shall within such time as may be allowed by the court, file a record of appeal, as is required by r 18. Rule 19 of the RCA provides as follows:

> 19 Failure to file record.
>
> (1) Where an appellant omits to comply with rule 18 any respondent who has given notice of cross-appeal may proceed with his cross-appeal.
>
> (2) In any such case the respondent shall, as soon as practicable, or within such time as may be allowed by the Court, file a record of appeal, as is prescribed by rule 18, together with copies thereof for the use of the judges of the Court, and shall serve copies thereof on the appellant and any other parties to the appeal.'

[128] Note that in the above instance the appellant's appeal is not struck out but will be disposed of at the hearing of the appeal.

[129] We trust that by saying more than is usually necessary since we have dismissed the application to strike out the cross-appeal upon learned counsel agreeing to withdraw the prayer, the respondent would have been forewarned of the risks it would face at the appeal proper.

DECISION

[130] To summarise we had allowed encl 18 filed by the appellant for enlarging time to serve the record of appeal which was served one day late. It was clearly excusable and curable in the circumstances of the case when the MCO was in force. We made no order as to costs.

[131] As for the other prayer in encl 18 to strike out the cross-appeal we find that it should have been by way of a separate motion and in any event the appellant had agreed to withdraw that prayer and so we had dismissed that prayer. We made no order as to costs.

[132] Enclosure 54 is the respondent's motion to strike out the notice of appeal. For the reasons given above we had dismissed the respondent's motion with costs in the cause. the respondent said it is serious with its cross-appeal and if we were to strike out the main appeal, the cross-appeal would fall with it.

[133] In any event, the questions of law to be decided on appeal have been set out in the memorandum of appeal and so the respondent is not prejudiced.

Appellant's application to enlarge time to file record of appeal allowed with no order

as to costs; appellant's application to strike out the cross-appeal dismissed; encl 54 dismissed with costs in the cause.

Reported by Dzulqarnain Ab Fatar